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No. 07-657

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROBERT J. CAMPBELL,
Petitioner,

v.

TOWN OF WEYMOUTH, MA, et al.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The parties to the proceeding, as stated in the Petition for a Writ of Certiorari, are taken directly from the Caption in the United States Court of Appeals for the First Circuit, Case No. 06-1794.

Federal Rules of Appellate Procedure ("Fed. R. App. Proc."), Rule 12 (a) required the First Circuit Clerk to "...docket the appeal under the title of the district court action...") [See First Circuit Docket Entry #26, dated 7/20/06, ORDER OF COURT, granting in part and denying in part Plaintiff-Appellant's Motion to Amend Caption and, First Circuit Docket Entry #30, dated 8/16/06, ORDER OF COURT, granting in part and denying in part Plaintiff-Appellant's Motion to Further Amend Caption].

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Abraham, Stephen E, *Williamson County* Fifteen Years Later: When Is Takings Claim (Ever) Ripe? © Real Property, Probate and Trust Journal, American Bar Association, Spring 2001 8-9

INTRODUCTION

The decision of the First Circuit ("1st Cir.") must be overturned for several important reasons:

First, because it misconstrues the petitioner's cause of action to be the single act of the Board of Zoning Appeals' ("BZA's") denial of his application for variance in 2002. This narrow approach failed to address the petitioner's claims that the alleged Due Process violations occurred when the Planning Board proposed, and the Town subsequently adopted the 1998 amendments to the zoning bylaws.

Second, and more importantly, because the judgment of the 1st Cir. cannot stand in conflict with decisions in other circuits, in comparable cases with claims and circumstances which parallel the instant case.

Third, because the 1st Cir. has incorrectly imposed a ripeness requirement which is inapplicable to Campbell's claims and further deviates from the prevailing law in other circuits.

Fourth, the judgment of the 1st Cir. should be reversed on the basis that the standard of review applied to his Substantive Due Process claim is inappropriate in the context of a zoning challenge.

Finally, despite the respondents' assertion that "[t]he Judgment in the present case holds no importance to the operation of our federal system..."[Brief in Opposition, pg. 10], the petitioner contends that this Honorable Court has yet to provide sufficient

guidelines, requirements, limitations or other wisdom on the appropriate involvement of the federal courts in cases and controversies pertaining to local zoning matters.

REASONS FOR GRANTING THE WRIT

I. FIRST CIRCUIT'S DECISION MISCONSTRUES PETITIONER'S CAUSE OF ACTION

The 1st Cir. has misconstrued the petitioner's cause of action to be the single act of the Board of Zoning Appeals' ("BZA's") denial of his application for variance in 2002. This narrow approach failed to address the petitioner's claims that the alleged Due Process violations occurred when the Planning Board proposed, and the Town subsequently adopted the 1998 amendments to the zoning bylaws. If not for the respondents' unlawful actions as charged, the requirement for a variance would not have existed, where the "[petitioner's] proposal meets each of the specific design and performance criteria specified in....the bylaw[s]." *Campbell v. Town Of Weymouth*, Massachusetts Land Court, Misc. Case No. 237269, (Sept. 1998) ("L.C. Docket #237269")[Appendix G, pg. App.43]

The opinion rendered by the 1st Cir. is completely void of any discussion on this issue and other claims properly raised in the District Court ("DC"), and argued on appeal, that the 1998 zoning amendments are unconstitutional as applied to locus; having been adopted illegally, and by deceptive means; in

retaliation for his previous appeal on L.C. Docket #237269; are discriminatory toward the petitioner and an entire protected class of citizens relying on the zoning exemption given by Massachusetts General Laws, ("M.G.L.") c.40A, §3; and are arbitrary and capricious, effecting no legitimate governmental interest whatsoever.

If the 1st Cir. had considered the proper cause of action, which the petitioner repeatedly identified, the judgment might have been altered with regards to the court's opinion on his Procedural Due Process claim.

II. FIRST CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS' INTERPRETATION OF *WILLIAMSON COUNTY PLANNING COM'N*

The judgment of the 1st Cir. is in direct conflict with decisions in other circuits, in comparable cases with claims and circumstances which parallel the instant case, and it cannot be allowed stand.

A. THE FIRST CIRCUIT CONSIDERS ALL COMPLAINTS BASED ON ZONING ACTIONS PRIMARILY AS A 5TH AMENDMENT TAKINGS CLAIMS

The 1st Circuit misinterprets this Court's decision in *Williamson County Planning Commissioners v. Hamilton Bank,* 473 U.S. 172 (1985), and considers a 5th Amendment Takings claim to be the only valid constitutional challenge resulting from zoning

disputes. The 1st Cir. further resolves any alternative causes of action by subsuming them under the Takings Clause of the 5th Amendment. As a result, a valid claim of deprivation of rights given by any other Article of the Constitution is considered subordinate to the Takings Clause.

Although the decision in *Williamson* set the standard for the proper resolution of zoning disputes based on a Takings claim, this Court also recognized a valid Due Process claim made by the respondent Hamilton Bank, but was unable to resolve the question due to jurisdictional failings. Mistakenly, the 1st Cir.'s narrow interpretation of this decision places more emphasis on the single issue which this Court could resolve from *Williamson,* and refuses to acknowledge that the unresolved question is even valid.

In *Williamson*, the respondent failed to meet the finality requirement on the effect the zoning regulations would have on their property. Having requested a variance and been summarily denied, the petitioner asserts a similar Due Process claim in the instant case which the Court in *Williamson* was unable to address. Unlike *Williamson,* this litigant has received that final administrative decision on the effect the regulations had on his proposal, thereby meeting the criteria set forth in *Williamson* on which a Substantive Due Process claim may be considered.

B. OTHER CIRCUIT COURTS RECOGNIZE DIFFERENT CLAIMS & CAUSES OF ACTION IN SIMILAR ZONING DISPUTES

Expanding the position offered by the Eleventh Circuit ("11th Cir.")[1], the Sixth Circuit ("6th Cir.") has identified six (6) distinct categories of valid federal zoning claims based on the First, Fifth and Fourteenth Amendments to the Constitution:

> 1. Just compensation takings claim....the remedy sought being the just compensation.
> 2. Due process takings claim...[t]he remedy sought is invalidation of the zoning regulation.
> 3. Arbitrary and capricious substantive due process claim...[with] [t]wo further subcategories...discerned under this heading: (a) facial and (b) as applied.
> 4. Equal protection. Either based on suspect class, invoking strict scrutiny, or mere economic discrimination.
> 5. Procedural due process....[a]lthough not discussed by the Eleventh Circuit...[n. 13]
> 6. First Amendment....when...claims...such as freedom of speech or religion [are] violated..." [See e.g. *Pearson v. City Of Grand Blanc,* 961 F.2d 1211, 1215-1216 (6th Cir. 1992)].

Courts in the Third, Fourth, Ninth, and Eleventh Circuits and the District of Columbia, have all followed suit, by allowing similar claims under these categories, to various degrees:

> "The Third Circuit will grant relief....where the zoning decision is irrational in the strict sense, [n.

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[1] *Eide v. Sarasota County*, 908 F.2d 716, 720-22 (11th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991); see also *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991).

30] or prompted by invidious political or discriminatory motives. [n. 31]....

"The Fourth Circuit agrees with the Third... the leading cases involve political or religious discrimination. [n. 32]....

"The Eleventh Circuit approach is similar to the Ninth. [n.42] Indeed, the Ninth Circuit relied on an Eleventh Circuit decision.

"The Ninth Circuit will subject local zoning decisions to substantive due process review, but the scope of review is that for legislation...and any relationship to a proper zoning goal, such as prevention of traffic congestion, will be sufficient. [n.40]...

"...[T]he District of Columbia Circuit applied a very deferential standard of review...that "[o]nly a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." [n.43]" *Pearson,* 961 F.2d, at 1218-19. [citations from footnotes omitted]

Indisputably, Campbell's claims could be considered valid under each category defined by the 6th Cir., in each of the aforementioned circuits.

III. FIRST CIRCUIT'S DECISION APPLIES ERRONEOUS RIPENESS REQUIREMENTS

Considering that the petitioner has chosen not to pursue a Just Compensation Takings claim as a cause of action, the 1st Cir. has incorrectly imposed a

ripeness requirement which is inapplicable to Campbell's claims and further deviates from the prevailing law in other circuits. Overruling a similar position by the trial court in *Pearson*, the 6th Cir. wisely noted, "[b]y holding that the taking theory subsumes all other theories in zoning cases...would impose these stringent ripeness requirements on all zoning cases." *Pearson*, 961 F.2d at 1215.

The Supreme Court in *Williamson County* defined the ripeness requirements for a Just Compensation claim, 473 U.S. at 196-97, 105 S.Ct. at 3122, but has since stopped short of providing any guidelines for the alternative claims, even while acknowledging that, "...arbitrary and capricious substantive due process grounds is valid in appropriate cases." See e.g. *Nectow v. City of Cambridge*, 277 U.S. 183, 187, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373, 47 S.Ct. 114, 115, 71 L.Ed. 303 (1926); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977).

In the Eleventh Circuit, "...as applied substantive due process" claims, are "not ripe until the decision denying commercial zoning has been finally made and applied to the property." *Eide v. Sarasota County*, 908 F.2d 716, 726 (11th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991). "Under this approach until at least one meaningful application has been submitted to the local zoning authority, futility is not established and a constitutional challenge to local zoning may not be entertained. *Id.* at 726 n. 17 (citing *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir.), cert.

denied, 488 U.S. 891, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988)); *Pearson*, 961 F.2d at 1215.

"The Ninth Circuit imposes an even more stringent ripeness requirement in non-taking zoning cases and requires that the landowner not only submit one meaningful application, but seek at least one variance if that application is denied, before coming to federal court. *Herrington v. County of Sonoma*, 834 F.2d 1488, 1494-95 (9th Cir.1987), modified, 857 F.2d 567, 568 (9th Cir.1988), cert. denied, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860." *Pearson*, 961 F.2d at 1215. The petitioner also meets the 9th Cir. criteria necessary to sustain a federal action.

In the 6th Cir., "...the very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication."*Pearson*, 961 F.2d at 1215.

> "Some courts have urged that ripeness is a flexible and context-specific test not to be applied rigidly or mechanically. [n. 10] See, e.g., *Sierra Club v. Yeutter*, 911 F.2d 1405, 1417 (10th Cir. 1990). However, a substantial number of cases demonstrates that ripeness challenges, especially to takings claims, are applied formalistically and serve as formidable, if not insurmountable, obstacles for plaintiffs seeking to litigate their claims in federal court. [n. 11] See, e.g. *Gilbert v. City of Cambridge*, 932 f.2d 51 (1st Clr. 1991); *Unity Ventures v. Lake County*, 841 F.2d 770 (7th Cir. 1988); *Austin v. City of Honolulu*, 840 F.2d

678 (9th Cir. 1988); *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994)." [2]

Addressing the ripeness requirements necessary to sustain a federal action in a zoning case before the 1st Cir., the DC acknowledged that,

"[t]he First Circuit has held that a §1983 takings claim is not ripe until the plaintiff has sought remedy under state inverse condemnation law. See *Ocha Realty Corp. v. Faria.* 815 F.2d 812, 816-17 (1st Cir. (Puerto Rico) 1987) ("Since we have held that the exhaustion of state law remedies...is a precondition to the maintenance of a federal damages action under the Takings Clause...we must perforce hold that the district court correctly dismissed the Fifth Amendment claims for money damages as premature.") (DC 1st Mem. & Order, pg.14 dated 6/27/05)

IV. FIRST CIRCUIT DECISION APPLIES AN ERRONEOUS STANDARD OF REVIEW TO THE PETITIONER'S CLAIMS

Even assuming arguendo, that the 1st Cir. has properly considered the petitioner's claims, the judgment should still be overturned on the basis that the standard of review applied to his Substantive

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[2] Abraham, Stephen E, *Williamson County* Fifteen Years Later: When Is Takings Claim (Ever) Ripe? © Real Property, Probate and Trust Journal, American Bar Association, Spring 2001

Due Process claim is inappropriate in the context of a zoning challenge. The court in *Pearson*, 961 F.2d at 1220-1223, also addressed this issue at length, reiterating it's earlier findings that, "...'[a]pplying the "shock the conscience" test in an area other than excessive force ... is problematic.'." [citing] *Cassady v. Tackett*, 938 F.2d 693, 698 (6th Cir.1991) (quoting *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir.1990)).

The 6th Cir. applies the following logic to similar cases:

> "Although the "shocks the conscience" terminology...is more apt for cases involving physical force, [n.66] it is useful in the zoning context too, to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority--and to underscore the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law. [n.67]
>
> By its "shocks the conscience" terminology the...court was referring to extreme irrationality--after all we would not expect a planning commission or board of adjustments to be pumping the landowner's stomach. [n.68]" (internal citations from footnotes omitted)

Campbell has argued continuously that the Planning Board and the Town's actions were unlawful, irrational and unauthorized, though arguably not conscience-shocking in the typical sense. The DC commented on this subject as well, where,

> "...such a claim rests not on the perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible," *Amsden v. Moran*, 904 F.2d 748,753 (d. N.H. 1990). For a claim of violation of substantive due process the plaintiff must show that the "state action [] in and of itself [is] egregiously unacceptable, outrageous, or conscience-shocking." Id. at 754." (DC 1st Mem. & Order, dated 6/27/05) [See Appendix I, pg. App.62]

Where the conjunction "or" is used in the precedent, the petitioner is entitled, at the very least, to some consideration by the court to determine if the respondents' actions were "impermissible," "egregiously unacceptable" or "outrageous." Once again, the Judgment of the 1st Cir. is silent on a critical issue of law, to the detriment of the petitioner's case.

The petitioner insists that the willful and deliberate act of lying to change zoning bylaws in an arbitrary and capricious fashion, as a preemptive and/or retaliatory act, specifically directed at an individual, while his appeal is pending on a related zoning decision, with the intent to contravene a statutory exemption, would always be considered impermissible, egregiously unacceptable and outrageous by any state or federal court other than the 1st Cir.. Yet, the judgment in this case relies solely on the inappropriate application of the "conscience-shocking" criteria that was developed exclusively to address an unauthorized physical invasion of a person's body. See *Rochin v. California*,

342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952).

V. DETERMINATION OF THESE ISSUES HAS LASTING AND TRANSCENDENT IMPORTANCE TO FEDERAL SYSTEM

The petitioner contends that this Honorable Court has yet to provide sufficient guidelines, requirements, limitations or other wisdom on the appropriate involvement of the federal courts in cases and controversies pertaining to local zoning matters. Only this Court has the authority to permanently define the type and nature of acceptable claims, any prerequisite requirements for federal intervention and the proper standards of review applicable to each claim.

Without the wisdom and intervention of this Court, the individual circuits will continue to interpret these issues independently, inevitably increasing the existing disparities between themselves, and likely creating further discord. "The lack of uniformity among the circuits in dealing with zoning cases of the "arbitrary and capricious substantive due process" category is remarkable." *Pearson,* 961 F.2d at 1217.

The rigid position of the 1st Cir. has been widely acknowledged by other circuits, most lucidly by the 6th Cir. in *Pearson,* 961 F.2d at 1217:

> "The First Circuit, it seems, shows a great reluctance to interject the federal courts into local zoning matters, holding that substantive due

> process is not violated by local zoning even when accompanied by claims of purposeful malicious obstruction of a landowner's rights. [n.24] It considers a zoning ordinance as a legislative act that need only bear a "conceivable rational relationship" to "legitimate governmental ends." [n.25] It precludes the trial court from inquiring into actual as opposed to the declared motives of the local legislative body in passing the ordinance. [n.26]" (citations from footnotes omitted) *Pearson*, at 1217.

Campbell humbly suggests that in addition to his own personal interests, the 1st Cir. and every other federal court would greatly benefit from this Court's attention to these issues, at this time. To relinquish this opportunity for a permanent resolution to the continuous flow of cases and controversies in local zoning matters is to neglect a duty and obligation with widespread implications that would undoubtedly encompass every square inch of land in this great country with potential ramifications for every property owner, developer, municipality, city, state and territory.

CONCLUSIONS

In conclusion, the petitioner contends that the majority of other circuits would be more likely to recognize his Due Process and alternative arguments as valid federal claims. In fact, this Court's willingness to consider the same Due Process claims made by the respondents in *Williamson County* is more amenable than the 1st Circuit's judgment in this regards.

If this Court finds that any other circuit is likely to consider any one of the petitioner's claims to be valid, then this Court is obligated to reverse the judgment in this case, and to further provide the appropriate ripeness requirement(s) and standard(s) of review for the various types of zoning challenges for consistency across all the circuits.

Wherefore, the Petitioner humbly askes this Honorable Court to grant this Petition to provide additional guidance to the circuits courts and a dispositive response to the questions posed.

Dated: January 10, 2008

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